

A Krishnan Rajan a/l N Krishnan v Public Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S6-23-72 OF 2001
ABDUL WAHAB J
2 JUNE 2003

B *Evidence — Burden of proof — Beyond reasonable doubt — Onus on applicant to prove contempt committed — Whether plaintiff succeeded in proving beyond reasonable doubt existence of false evidence*

C The plaintiff had earlier commenced an action against the defendant alleging malicious falsehood and defamation and sought damages for reporting the plaintiff to Bank Negara as issuer of bad cheques. The defence by the defendant in that action was that the plaintiff was the alter ego of a partnership that maintained an account with the defendant bank at the material time. In attempting to support the defence of alter ego, two employees of the defendant bank went about to gather evidence to substantiate the defence that the plaintiff was the alter ego. This was the plaintiff's application for a motion to commit Mr Khoo Chee Fong and En Abdullah bin Jusoh ('the alleged contemnors'), officers of the defendant for contempt by an act of persuading Cik Marina bte Mokhtar ('Cik Marina') to prepare and complete a letter containing false evidence that she knew the plaintiff to be the manager of Pinecoat Marketing.

E **Held**, dismissing the application:

F (1) There is always a fine line between obtaining evidence in support of a case or defence and procuring of false testimony which latter is a contempt of court. This is all the more reason why the contempt, which would result in penal sanctions, must be proved beyond reasonable doubt. The onus to do so is always upon the prosecutor, in this instance the applicant (see para 12).

G (2) The plaintiff had only proved the probability that Abdullah bin Jusoh attempted to persuade to give false testimony. But the proof, such as this, was unsafe, for a conclusion to say that the plaintiff had succeeded to prove beyond reasonable doubt that the contents of the letters were the brainchild of Abdullah bin Jusoh and not what he was told by Cik Marina. Therefore, there was no evidence to support the contention that Khoo Chee Fong instructed Abdullah bin Jusoh to commit a contempt (see paras 26-27).

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[Bahasa Malaysia summary]

I Plaintiff sebelum ini telah memulakan satu tindakan terhadap defendan mengatakan berlaku pemalsuan dengan niat jahat dan fitnah kerana melaporkan plaintiff kepada Bank Negara sebagai pengeluar cek tak laku. Pembelaan oleh defendan dalam tindakan tersebut adalah bahawa plaintiff adalah alter ego satu perkongsian yang mengekalkan akaun dengan bank

defendan pada masa matan. Dalam percubaan untuk mnyokong pembelaan alter ego tersebut, dua pekerja bank defendan telah mengumpul keterangan untuk mengukuhkan pembelaan bahawa plaintif adalah alter ego tersebut. Ini adalah permohonan plaintif untuk satu usul mendakwa Encik Khoo Chee Fong dan En Abdullah bin Jusoh ('penghina-penghina yang dikatakan'), pegawai-pegawai defendan kerana penghinaan melalui satu perbuatan memujuk Cik Marina bte Mokhtar ('Cik Marina') untuk menyedia dan melengkapkan sepucuk surat mengandungi keterangan palsu yang beliau mengetahui plaintif sebagai pengurus Pinecoat Marketing.

Diputuskan, menolak pemohonan tersebut:

- (1) Selalunya terdapat garis pemisah antara memperoleh keterangan sokongan untuk kes atau opembelaan dan membuat keterangan palsu di mana yang kemudian itu satu penghinaan mahkamah. Lebih-lebih lagi kenapa penghinaan, yang akan mengakibatkan sanksi penal, perlu dibuktikan melampaui keraguan munasabah. Beban berbuat demikian sentiasa terletak atas pendakwa, dalam kes semasa ini pemohon (lihat perenggan 12).
- (2) Plaintif hanya membuktikan kemungkinan bahawa Abdullah bin Jusoh telah cuba untuk memujuk dalam memberikan keterangan palsu. Tetapi bukti tersebut, seperti ini, tidak selamat, kerana satu kesimpulan yang mengatakan plaintif telah berjaya untuk membuktikan melampaui keraguan munasabah bahawa kandungan-kandungan dalam surat tersebut adalah idea Abdullah bin Jusoh dan bukan apa yang diberitahu kepada beliau oleh Cik Marina. Oleh itu, tiada keterangan yang menyokong hujah bahawa Khoo Chee Fong telah mengarahkan Abdullah bin Jusoh untuk membuat penghinaan tersebut (lihat perenggan-perenggan 26–27).]

Notes

For cases on burden of proof beyond reasonable doubt, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 346.

Cases referred to

Balogh v Crown Court at St Albans [1974] 3 All ER 283 (refd)

Legislation referred to

Evidence Act 1950 s 114

Amir bin Ismail (Goh Peng Hong with him) (Fahrol, Pretam & Co) for the plaintiff.

Harjit Singh Sandhu (Raja Eleena Siew Ang & Assoc) for the defendant.

A Abdul Wahab J:

- [1]** The plaintiff applied in this motion to commit Mr Khoo Chee Fong and En Abdullah bin Jusoh ('the alleged contemnors'), officers of the defendant for contempt. The act complained of as contempt is attempting to persuade Cik Marina bte Mokhtar ('Cik Marina') to prepare and complete a letter containing false evidence, which was drafted by Abdullah bin Jusoh upon direction of Khoo Chee Fong in an ongoing case. It was asserted that they wanted Cik Marina to make a statement that she knew the plaintiff to be the manager of Pinecoat Marketing.

C *The background*

- [2]** The plaintiff had commenced an action against the defendant alleging malicious falsehood and defamation and sought damages for reporting the plaintiff to Bank Negara as issuer of bad cheques.
- D** **[3]** The defence by the defendant in that action is that the plaintiff is the alter ego of a partnership that maintained an account with the defendant bank at the material time.

- [4]** In attempting to support the defence of alter ego, the above-mentioned employees of the defendant bank went about to gather evidence to substantiate the defence that the plaintiff was the alter ego.

The plaintiff's case

- [5]** The plaintiff exhibited at encl 10 exh KR-3, a statutory declaration that on the face of it purports to have been made by Cik Marina. In that statutory declaration, she asserted that the above-mentioned Abdullah bin Jusoh had contacted her by telephone a number of times, had visited her on 28 September 2001 in her house and on that occasion drafted two letters for her to sign. She said he told her that Khoo Chee Fong instructed him. She asserted in that statutory declaration that she did not know who was the manager of Pinecoat Marketing.

- [6]** The said Cik Marina made an affidavit repeating her assertions in the statutory declaration.

- [7]** The plaintiff's case is, briefly, that:

- (a)** not only was the letter drafted by Abdullah bin Jusoh, but he also gave instructions to her what to do;
- (b)** the plaintiff was the mandatee to sign cheques of Pinecoat Marketing, thus had the permission of the defendant bank and the partners of Pinecoat Marketing;
- (c)** Pinecoat Marketing had issued bad cheques but the defendant bank reported only the plaintiff to Bank Negara;

- (d) the defendant bank had no choice by virtue of their defence that the plaintiff is the alter ego of Pinecoat Marketing but to go about to gather evidence to link the plaintiff to the partnership after their defence had been filed. **A**

The defence

[8] Abdullah bin Jusoh said by affidavit he had visited Cik Marina in order to find out if the plaintiff was the Manager of Shintokote (M) Sdn Bhd, Fixroy Industrial Products Sdn Bhd and Pinecoat Marketing, and if so, whether she would be willing to give testimony in court and to give a written acknowledgement. He said he knew Cik Marina because she often came to deposit cheques for Shintokote (M) Sdn Bhd, Fixroy Industrial Products Sdn Bhd and Pinecoat Marketing. He said she told him to draft the letter of acknowledgement and she would consider it, saying that she was afraid because all her relatives worked there and if anything happened there would be difficulties. He said he had, therefore, drafted the letter. **B**

[9] Khoo Chee Fong said by affidavit he had not at any time instructed Abdullah bin Jusoh to offer Cik Marina any inducement or to ask her to make any false written statement. He said Abdullah bin Jusoh was accompanied by another employee, Mohd Fazli bin Kasim. **C**

[10] Mohd Fazli bin Kasim by his affidavit confirmed the assertions of both Mr Khoo Chee Fong and Abdullah bin Jusoh. **D**

[11] It was submitted that: **E**

- (a) the drafted letters were never finalised, signed or sent back to the defendant; **F**
- (b) if indeed the plaintiff was the manager of Pinecoat Marketing it does not prove the defence of alter ego; **G**
- (c) relying upon *Balogh v Crown Court at St Albans* [1974] 3 All ER 283 (CA) at p 290, an attempt to commit a contempt is not contempt;
- (d) the truth or otherwise of statement as drafted would only be determined in the main action when tried, and a decision in this case would pre-judge the issue; **G**
- (e) there was no attempt to fabricate any evidence.

The considerations

[12] There is always a fine line between obtaining evidence in support of a case or defence and procuring of false testimony which latter is a contempt of court. This is all the more reason why the contempt, which would result in penal sanctions, must be proved beyond reasonable doubt. The onus to do so is always upon the prosecutor, in this instance the applicant. **H**

[13] The unchallenged evidence is that upon the instructions of Khoo Chee Fong, Abdullah bin Jusoh went on 28 September 2001 to see Cik Marina, who is a potential witness in a civil action between the plaintiff and **I**

- A** the employer of Abdullah bin Jusoh and Khoo Chee Fong. Here there are two versions:
- (a) the plaintiff says that the alleged contemnors (see notice of motion) attempted to persuade Cik Marina to prepare and finalize a letter as in MM2 to be used in that civil action;
- B** (b) the alleged contemnors say that Khoo Chee Fong had instructed Abdullah bin Jusoh to approach Cik Marina to seek her assistance concerning the civil suit and explore the possibility of her testifying in court. When Abdullah bin Jusoh and Mohd Fazli bin Kassim went to see her, it was she who told Abdullah bin Jusoh to draft MM1 and MM2 for her consideration and that she would send the letter later.
- C**

The evidence of contempt

- D** [14] In her affidavit of 10 April 2002, Jalimah bte Karim ('Pn Jalimah') confirmed the affidavit of her daughter, Cik Marina, and said, 'Setelah surat-surat yang telah dirakamkan dan didrafkan oleh Abdullah bin Jusoh ... Abdullah telah mendesak Marina menyelesaikan kedua-dua surat dengan serta merta ... '

- E** [15] Cik Marina said in her affidavit of 9 April 2002 — 'Walaupun jawapan saya kepadanya sungguh jelas, ianya tidak diterima pakai oleh Abdullah ... oleh kerana pada masa itu juga dan di hadapan saya, dia telah merakam MM1 dan MM2 ... Abdullah bin Jusoh telah mendesak saya supaya MM1 dan MM2 diselesaikan oleh saya secara serta merta.'

[16] In her second affidavit, she repeated the use of the word 'Rakam'.

- F** [17] The evidence of Mohd Fazli confirmed that of Abdullah bin Jusoh and Khoo Chee Fong. His testimony was not challenged. He was not cross-examined. Neither was the evidence of Pn Jalimah and Cik Marina challenged. This differs little from occasions that the testimony of a witness is challenged, but that the challenge failed to cause or persuade the witness to change his or her testimony. If all witnesses maintain their own versions, the effort to discern the truth must identify the differences in the testimonies:
- G**

- (a) seek to understand the precise meanings of the words used by the witnesses;
- (b) seek to understand why the witnesses may describe the events differently; and
- H** (c) having regard (in the language of s 114 of the Evidence Act 1950) to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case, make inferences or findings of facts which it thinks likely, on the basis of all of the evidence, to have happened.
- I**

[18] I had asked Amir Ismail, counsel for the plaintiff, the meaning of the word 'rakam'. He said it means, 'draft'.

[19] If that meaning is correct then there is no need for Pn Jalimah to say, 'dirakam dan didraf ...'. The correct meaning of 'rakam' is 'to record', which means recording the words of someone else. In other words, what she actually said was that Abdullah bin Jusoh 'recorded and drafted'. The meaning is that the substance of that which was recorded or drafted came from Cik Marina and not Abdullah bin Jusoh. If that is so, then it must follow that the evidence of Pn Jalimah and Cik Marina, precisely understood, supports the assertion of Abdullah bin Jusoh, he was merely drafting at the request of Cik Marina, and not himself giving to her a desired statement for her to sign even if it is not true.

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[20] Abdullah bin Jusoh in his affidavit of 19 March 2002 said Cik Marina replied 'awak sediakan surat itu, nanti saya tengok macam mana, saya pun takut juga sebab semua keluarga saya masih berkerja di sana, nanti apa apa berlaku susah saya tahu ...'.

C

[21] Even if the above evidence is accepted as true because it was not challenged, it is at most equivocal. Cik Marina might require time to consider whether to make the statement regardless whether it is true or not if all her relatives were employed with the plaintiff. It makes no difference, therefore, to the defence of Abdullah bin Jusoh.

D

[22] On this issue, counsel properly questioned Abdullah bin Jusoh. But a careful reading of the record shows that counsel asked questions, obtained answers but did not challenge those answers. In other words, he tested the affidavit testimony of the witness. But it would appear on the face of it, he accepted those answers. It was not put to Abdullah bin Jusoh that he was not telling the truth.

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[23] That Abdullah bin Jusoh gave instructions to Cik Marina what to do is to my mind neither here nor there as to whether the statement is truthful or false. The instructions would follow whether or not the statement sought from her was true or not true. The fact there is no other evidence to support a conclusion that Abdullah bin Jusoh was so persistent as to insist on a statement there and then as he desired, but was willing to leave it to her to make later, suggests that the version of Abdullah bin Jusoh is more probable.

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[24] The other facts relied upon by the plaintiff, that the plaintiff is the mandatee of the partners of Pinecoat Marketing to sign cheques, and therefore that information is within the knowledge of the defendant bank, and that the defendant bank reported the plaintiff but not Pinecoat Marketing are facts which might have a bearing in the main suit, but have no bearing to this application before the court.

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[25] On an overall consideration, the evidence before the court is equally consistent with an effort to persuade a reluctant witness to tell the truth as it is with an attempt to persuade a witness to give false evidence. The fact that Abdullah bin Jusoh sought to obtain a written statement instead of simply leaving it to Cik Marina to give oral evidence is to my mind no different from the action of the plaintiff to obtain a statutory declaration from Cik Marina before obtaining an affidavit from her.

I

A [26] At best, the plaintiff has only proved the probability that Abdullah bin Jusoh attempted to persuade to give false testimony. But the proof, such as it is, is unsafe, for a conclusion to say that the plaintiff has succeeded to prove beyond reasonable doubt that the contents of MM1 and MM2 are the brainchild of Abdullah bin Jusoh and not what he was told by Cik Marina.

B [27] There is no evidence to support the contention that Khoo Chee Fong instructed Abdullah bin Jusoh to commit a contempt.

[28] For these reasons, the application is dismissed.

C [29] No order as to costs is made because the predicament Khoo Chee Fong and Abdullah bin Jusoh found themselves in arises in part from their own actions. Assertions of fact in pleadings must be made only upon having verified there is evidence to maintain in submissions that assertion. The alleged contemnors' function is to turn over all evidence that is relevant to their solicitors at the stage pleadings were prepared. Making the assertion in defence first and then trying to find the evidence to support it later invites allegations of fabrication. Moreover, once the case is in the hands of

D solicitors, it is best to leave it to them.

Application dismissed.

Reported by Ezatul Zuria Azhari

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